BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES L. ROSS, JR.)
Claimant VS.)))))))))
THE BOEING COMPANY-WICHITA Respondent) Docket No. 132,330
AND	
AETNA CASUALTY & SURETY CO. Insurance Carrier	

ORDER

Claimant appeals from an Order entered by Administrative Law Judge Shannon S. Krysl on August 30, 1994. The Appeals Board heard argument of the parties by telephone conference on November 29, 1994.

APPEARANCES

The claimant appeared by and through his attorney, Robert R. Lee of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. There were no other appearances.

RECORD

No transcript was made of the proceedings that were held before the Administrative Law Judge that resulted in the Order dated August 30, 1994.

ISSUES

The specific issue that the claimant stated in his Application for Review was, "Whether respondent is entitled to a credit from claimant for overpayment of permanent partial disability." However, during oral argument the claimant also raised the issue that the Administrative Law Judge erred in not awarding penalties pursuant to K.S.A. 44-512a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

These proceedings were commenced by the claimant by filing an Application for Penalties on August 2, 1994. In his Application, the claimant alleged the respondent failed to comply with the Administrative Law Judge's Order of June 20, 1994, and further failed to make payments pursuant to an Award of Review and Modification, dated June 3, 1994.

During oral argument, the respondent raised the threshold question as to whether this Order is subject to review by the Appeals Board as there was no evidentiary record made before the Administrative Law Judge. K.S.A. 44-551(b)(1), as amended by S.B. 59, 1995, grants the Appeals Board jurisdiction to review all acts, findings, awards, decisions, rulings or modifications of findings or awards made by an Administrative Law Judge. Application for penalties is not a preliminary award. It is a separate proceeding, subject to de novo review as a final order upon written request made within ten (10) days from entry of the order. See Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185, rev. denied 251 Kan. 942 (1992).

The scope of the Appeals Board review is "upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." See K.S.A. 44-555b(a), as amended by S.B. 59, 1995. The Appeals Board finds that an evidentiary record is a necessary prerequisite for the Appeals Board to review an order granting or denying penalties. The claimant has the burden of proving his right to penalties pursuant to K.S.A. 44-512a. Since he did not establish a record before the Administrative Law Judge for review by the Appeals Board, his Application for Review must therefore be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that for the above stated reasons, the Application for Review filed by the claimant is hereby dismissed.

IT IS SO ORDERED.	
Dated this day of March, 1995.	
BOARD MEMBER	
BOARD MEMBER	
BOARD MEMBER	

c: Robert R. Lee, Wichita, KS Vaughn Burkholder, Wichita, KS Shannon S. Krysl, Administrative Law Judge George Gomez, Director